UNITED STATES DEPARTMENT OF AGRICULTURE
FARM CREDIT ADMINISTRATION
WASHINGTON, D. C.

SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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Summary No. 48

December 1950

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COOPERATIVE ILLEGALLY EXCLUDED FROM MARKET

In 1949, the American Federation of Tobacco Growers erected a warehouse outside the corporate limits of Danville, Virginia, "at a strategic location on a public highway." The cooperative then applied for membership in the Danville Tobacco Association, a corporation created by a special Act of the General Assembly of Virginia in the year 1887 "for the purpose of encouraging, promoting and regulating the sales of leaf tobacco and trade therein in the town of Danville." The Board of Governors of the Danville Tobacco Association refused membership to the cooperative.

The Danville Tobacco Association had "prescribed rules and regulations governing auction sales throughout the bright tobacco belt; and among these are regulations to the effect that the sales shall be held for only five and one-half hours per day, that the number of baskets of tobacco which may be sold per hour shall not exceed 400 and that not more than 300 pounds of tobacco may be sold in one basket. The bidders at the sales are representatives of the tobacco manufacturing companies and independent buyers or speculators. The presence of a group of buyers representing the principal manufacturing companies is necessary for the holding of a satisfactory auction sale; and, as it is not possible under the regulations for a buyer to bid on more than 2,200 baskets per day, it is necessary for each of the companies to have a number of buyers at a large market like Danville. There were buying on that market at the time of the institution of this suit four sets of buyers representing the leading tobacco manufacturing companies of the country."

Because the Danville Tobacco Association did not admit the cooperative association to membership and because that association refused to allot selling time to the cooperative warehouse, the cooperative brought suit against the Danville Tobacco Association alleging that the action of the association violated the Sherman Antitrust Act (15 U.S.C.A., § 1, et seq.) and also the statute which forbids a board of trade from discriminating against farmers' cooperative associations (15 U.S.C.A., § 431, et seq.).

The Trial Court (89 F. Supp. 12) held against the cooperative, and the cooperative then appealed to the Circuit Court of Appeals for the Fourth Circuit (American Federation of Tobacco Growers, Inc. v. Neal, et al., 183 F. 2d 869). The Circuit Court of Appeals reversed the Trial Court and stated that "the District Judge entered summary judgment for defendants on the theory that, although a restraint of trade was shown, it was not an unreasonable restraint in view of the fact that warehousemen within the City of Danville were burdened by higher real estate values and higher building costs than warehousemen outside the city and were subject to certain taxes to which the latter were not subject, and that defendants had done nothing to prevent plaintiff's proceeding independently if it was able to do so." (Underscoring added.)

The Circuit Court of Appeals in holding that the reasons given by the District Court for deciding the case in favor of the defendants were unsound said in part:

"To say that a board of trade whose members have monopolistic control of a market may exclude an outsider who wishes to compete therein merely because he has an advantage in taxes or construction costs is to advance a proposition that has no support in any decision with which we are familiar, and none has been cited in support of it. Persons trading in and controlling a market, who have a heavy expense because they operate in an expensive building, would certainly not be justified on that account in excluding from competition a prospective competitor who was not burdened by such an expense; but there would be just as much reason in this as in permitting them to exclude him because his warehouse or factory was not subject to city costs and taxes. A restraint of trade involving the elimination of a competitor is to be deemed reasonable or unreasonable on the basis of matters affecting the trade itself, not on the relative cost of doing business of the persons engaged in competition. One of the great values of competition is that it encourages those who compete to reduce costs and lower prices and thus pass on the saving to the public; and the bane of monopoly is that it perpetuates high costs and uneconomic practice at the expense of the public.

"It is argued that defendants do not exert a monopolistic control of the market because plaintiff is at liberty to conduct independent sales in its warehouse notwithstanding their refusal to allot it selling time; but this ignores the realities of the situation. Under the system of market control which defendants have built up, allotment of selling time is prerequisite to doing business in the market; and, having set up the market in this way, defendants may not be heard to say that they have not established a monopoly merely because they do not interfere with an outside warehouse if it can shift for itself. It was just this sort of manipulation, involving the control of markets and the stifling of competition, that the Sherman Act was intended to prevent. As was well said by Judge Learned Hand in United States v. Associated Press, D. C., 52 F. Supp. 362,369: 'If a combination effectively excludes, or tries to exclude, outsiders from the business altogether, it is a monopoly, or an incipient monopoly, and it is unconditionally unlawful. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136; Montague & Co. v. Lowry, 193 U.S. 38, 24 S. Ct. 307, 48 L. Ed. 608; Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 668, 61 S.Ct. 703, 85 L. Ed. 949; American Medical Ass'n v. United States, 317 U.S. 519, 63 S. Ct. 326, 87 L. Ed. [434]. That is indeed the standard type of an illicit combination.'" (Underscoring added.)

The Court of Appeals further said:

"As to the contention that the restraint of trade here involved was a reasonable one, it is a sufficient answer

that the effect of the action of the defendants was to exclude a competitor from a substantial market in interstate commerce; and it is well settled that such exclusion is unreasonable per se. 'The purpose of the anti-trust laws--an intendment to secure equality of opportunity--is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete'. William Goldman Theatres v. Loew's, Inc., 3 Cir., 150 F. 2d 738, 743. 'Not only is price fixing unreasonable, per se, * * * but also it is unreasonable, per se, to foreclose competitors from any substantial market.' International Salt Co. v. United States, 332 U.S. 392, 396, 68 S. Ct. 12, 15, 92 L. Ed. 20; Fashion Originators Guild v. Federal Trade Comm., 2 Cir., 114 F. 2d 80, affirmed 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949. 'The anti-trust laws are as much violated by the prevention of competition as by its destruction* * *. It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.' United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236. See also Fashion Originators Guild v. Federal Trade Comm., 312 U.S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949; American Medical Ass'n v. United States, 317 U.S. 519, 63 S. Ct. 326, 87 L. Ed. 434." (Underscoring added.)

The Danville Tobacco Association also urged that it was not allowed by the terms of its charter to admit to membership warehouses that were located outside the corporate limits of Danville, Virginia. In pointing out the fallaciousness of this contention, the Appellate Court said:

"There can be no question but that, by their control of the allotment of selling time, defendants had it within their power to exclude plaintiff from the Danville market or that plaintiff was excluded therefrom and eliminated as a competitor as a result of their exercising the power. The reason given by defendants for their action, i.e. that they were not allowed by their charter to admit to membership warehouses not within the corporate limits of Danville or to exercise any sort of regulation over warehouses beyond those limits, will not stand analysis. The act incorporating the tobacco board of trade had reference, of course, not to the corporate limits of Danville but to the tobacco market which was growing up at that place, a market in which tobacco was sold from all the surrounding country. It was to the regulation of this market that the act creating the Board of trade was addressed; and it passes the bounds of all reason that the legislature could have intended that such a board of trade should limit its functions to the corporate limits of the city and discriminate against tobacco warehouses outside those limits, merely because they happened to be outside boundaries which had no relation to the market and which were subject to change from time to time." (Underscoring added.)

The Appellate Court in holding that a summary judgment for the defendant was not warranted "on the claim made under the statute forbidding discrimination against farmers cooperative associations" said:

> "The fact that the defendants' warehouses charge a uniform commission for their services and that the plan of the cooperatives gives profits derived from operation to members, coupled with the flimsy nature of the reason given by defendants for excluding plaintiff from participation in the tobacco market, is sufficient to raise a substantial question as to whether there was not present in the case the discrimination which the latter statute forbids. Since we are of opinion that the Sherman Act has been violated, however, and all the relief which plaintiff seeks may be obtained under that statute, it will probably not be necessary to deal further with questions arising under the statute forbidding discrimination against farmers cooperatives." (Underscoring added.)

WISCONSIN MILK ANTITRUST CASE

In the case of State v. Golden Guernsey Dairy Cooperative, et al., 43 N.W. 2d 31, it appeared that the State of Wisconsin instituted an action against seven domestic corporations, two foreign corporations, and two individual co-partners, charging them with violating the anti-trust laws of that State. The defendants sold and distributed 94 percent of the fluid milk used in Milwaukee County, Wisconsin. There was only one other distributor of milk in that county.

In the action brought by the State of Wisconsin, the State was seeking to recover the maximum penalty of $5,000 from each of the defendants except one of the co-partners who had attained immunity, and it demanded that each defendant be enjoined from further violations of the anti-trust Acts of the State, and in the case of the domestic corporations, the State of Wisconsin also demanded that the charters of these corporations be cancelled and annulled, and in the case of the foreign corporations, it also demanded that their permits or licenses to do business in Wisconsin be cancelled and annulled.

The defendants demurred to the complaint filed against them, and the Trial Court overruled the demurrers. The defendants then appealed.

The following quotations from the opinion affirming the judgment of the Trial Court show the basis of the action, and the reasons for the conclusions reached:

> "Defendants submit that the complaint does not allege that either in the meetings or in the subsequent individual exchanges of information did they agree upon prices to be charged or agree to adhere to such prices as were announced;

that the things which the complaint says the defendants did were lawful things which do not constitute a sufficient basis for inferring that an unlawful agreement existed; and unless an unlawful agreement exists there can be no unlawful conspiracy. The defendants concede that an unlawful agreement, which they say is the essence of conspiracy or unlawful combination, may be established by implication from the acts and conduct of the parties but they urge that the unlawful agreement which the complaint alleges is a conclusion without force or effect because it may not legitimately be inferred from the so-called lawful events which are pleaded; hence, the conclusion of agreement being invalid, no allegation of agreement remains and the complaint has failed to state a cause of action.

"It is true that the complaint does not specifically allege that the defendants agreed upon the fixing or the maintenance of prices at either the meetings of the group or in the individual discussions. It does not say precisely when the agreement was made but it says there was and continues to be one whose existence is to be implied from the facts that the defendants first conferred and then unanimously and simultaneously performed identical acts, and this sequence occurred not only once but twice. While it is possible that the uniform behavior of the defendants may be attributed to some other stimulus, we think that reasonable men observing the repeated phenomenon of ostensible competitors, so diverse in size and organization, suddenly reacting in an identical manner would, until the reaction was otherwise explained, conclude that the uniformity was the result of agreement; in other words, that under such circumstances the concerted action implied an agreement so to act. Defendants cite authority that competitors may lawfully exchange information on the expense of doing business and may lawfully inform each other of projected price changes, and they argue that the existence of an unlawful agreement may not be implied from lawful acts. There is, of course, present here the further factor of the concerted price action. If fixing prices was not illegal we do not think that the defendants, themselves, would have any difficulty in seeing that an agreement to fix them was quite clearly and fairly to be implied from the sequence of consultation and price action which the complaint alleges. That implication is not changed at all by the view which the law takes of the legality of the agreement.

* * * * * * * * *

"These defendants also contend that the statutes requiring revocation of corporate charters and licenses are unconstitutional and void as depriving the offending corporations of their property without due process of law, denying them the equal protection of the laws and unduly burdening interstate

commerce and such penalties constitute cruel, unusual and excessive punishment. The brief and oral argument on this phase was devoted almost entirely to the situation of the defendant Borden Company which considered itself particularly aggrieved. It was submitted that the loss which Bordon would sustain by ouster far surpasses that imposed on the domestic corporations by dissolution because of Borden's great size and business interests. We are unable to follow the argument that when the law prescribes the same penalty for the same offense upon all offenders a discrimination has actually been practiced because the penalty hurts some worse than others. Nor can we concede that the revocation of corporate charters and licenses to do business is unusual punishment for the abuse of such charters and licenses by bodies who are creatures of statute and who exist or come into the state only by the state's permission. This remedy for unlawful conduct by corporations is of long standing and has been frequently invoked.

"'Corporations are recognized as creatures of the law and they owe obedience thereto, and, when they fail to perform duties which they were created to discharge and in which the public has an interest, or where they do unauthorized or forbidden acts, the state has the right to wrest its franchise from the offending corporation. * * *' 19C.J.S., §1651, Corporations.

"We cannot say that the penalty is unusual nor do we say it is excessive or disproportionate to the offense of controlling the price of food through a conspiracy. As for cruelty, there can be none to a corporation which is an artificial, not a natural body.

"'* * * There is no "personal" death or loss of liberty in the annulment of a corporate franchise or in a judgment for damages against it. When, therefore, it undertakes to do that which the law forbids, and which injures the public, it has no claim for mercy that needs be recognized.' Nekoosa-Edwards Paper Co. v. News Publishing Co., 1921, 174 Wis. 107, 116, 182 N.W. 919, 922.

"The final argument is that if a corporation reaches such a size and does so much business that its dissolution or ouster would unduly burden interstate commerce, then the state must suffer its presence notwithstanding its lawless conduct and may impose only such mild penalties as do not interfere with its operations. The application of the principle would absolve the corporation from effective punishment for noncompliance with any state law. This presents a challenge to its sovereignty which the state must meet. If it is sound law that the magnitude of the corporation constitutes it the ward of the commerce clause of the federal constitution and makes it invulnerable to control by the state which has

created or admitted it, the state in its own defense must oust or dissolve it, if possible, before such size is attained. If the principle is not sound law, but is only resounding arrogance, and this is our view, the penalties are not unconstitutional because of any supposed effect on interstate commerce. And so thought the Supreme Court of the United States, as we read its opinion in Standard Oil Co. of Indiana v. State of Missouri, 224 U.S. 270, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936, in which it affirmed the decision of the Supreme Court of Missouri, reported in 218 Mo. 1, 116 S.W. 902, which upheld the penalty of fine and ouster imposed on the corporation for violation of the state's antitrust laws." (Underscoring added.)

Attention is called to the fact that the basis of the complaint was uniformity in prices following meetings held by the defendants, and, as pointed out above, the Court was of the opinion that an agreement to fix prices could be inferred from the uniformity of prices.

The published opinion of the Supreme Court of the District of Columbia in the antitrust case of United States v. Maryland & Virginia Milk Producers Association, Inc., finding certain of the defendants guilty will be found in 90 F. Supp. 681. This case was discussed in Summary No. 43, page 6, and in Summary No. 46, page 25. The published opinion of the Supreme Court of the District of Columbia makes it clear that that Court was of the opinion that the defendants who were adjudged guilty of violating the Federal antitrust laws were guilty because the association had entered into full-supply contracts with the milk distributors concerned under which the price to be paid for milk by the milk distributors was determined on the basis of the use to which the milk in question was put. The case was dismissed as to certain defendants who did not have full-supply contracts, but who in fact purchased milk on a classified use basis.

In the Massachusetts case of Commonwealth v. McHugh, et al., 93 N.E. 2d 751, an antitrust proceeding instituted by the State of Massachusetts "against the officers and members of the Atlantic Fishermen's Union, a voluntary association," it was held that the Fishermen's Cooperative Marketing Act, 15 U.S.C. 521, which is similar to the Capper-Volstead Act, had no application to the situation involved, as the officers and members of the Union were employees and were not independent operators. It was also held that no labor dispute was involved and that the Federal antitrust Acts did not prevent the State from proceeding under its own antitrust laws.

PATRONAGE DIVIDENDS NOT REBATES

The Alcoholic Beverage Control Act of California requires that every licensee obtaining a license from the State Board of Equalization for the sale of liquor shall post its prices with the Board, and the licensee is required to adhere to such prices and is forbidden to make gifts or give free goods in connection with the sale of liquor.

In the case of Certified Grocers of California, Ltd., et al. v. State Board of Equalization, et al., decided by a District Court of Appeals of California, 223 P. 2d 291, it appeared that:

> "Certified Grocers of California, Ltd. is a cooperative corporation, organized under provisions of the Corporations Code. It is a wholesale grocer, selling to its members only. Each member is a retail grocer, and each member owns ten shares of stock of the cooperative. There are approximately 1,500 members. Periodically, dividends, called patronage dividends, are paid to stockholders, returning to each his share of surplus-savings and earnings. Corp. Code, Sec. 12805." (Underscoring added.)

Certified Grocers of California obtained an "off-sale beer and wine wholesaler's license." The cooperative sold to its members only. As stated, Certified Grocers was functioning as a wholesaler for approximately 1,500 members, each of which was a retail grocer.

The State Board of Equalization charged that Certified Grocers had sold liquor to retail licensees who were its stockholders at a price less than the effective posted price on file with the Board, and it also charged the cooperative with the giving of rebates. These charges were based on the fact that the cooperative paid patronage dividends to stockholder members of a little over 1-1/2 percent of the wholesale price. In view of the circumstances, the State Board of Equalization suspended the license of Certifiod Grocers. Certified Grocers then filed a suit in the Superior Court to nullify this action. The Trial Court held in favor of Certified Grocers, thus setting aside the suspension of the license. The State Board of Equalization then appealed. In affirming the judgment of the Trial Court, the Appellate Court said:

> "The Board contends that payments of the patronage dividends violate Sec. 38e of the Alcoholic Beverage Control Act. 2 Deering's Gen. Laws, Act 3796. This section requires that all posted prices 'shall be strictly adhered to' and that any violation of the law shall be a misdemeanor. The Board also contends that these payments violate Sec. 55.7 of the Act, prohibiting gifts or free goods in connection with the sale of alcoholic beverages.
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> "An opinion by the Attorney General, dated April 20, 1938, states the view of his office as follows:
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> "'The obvious purpose of Section 38e is to make public the prices charged by the manufacturers and wholesale distributors of beer so that competitors may know the prices being charged and thus be in a position to compete with such prices. The provisions of Section 38e also aid in enforcing the provisions of Section 54 which prohibits manufacturers and wholesalers from being interested in the business of retailers and from giving secret rebates and secret concessions.

"'Obviously a posted price which is not immediately mathematically certain defeats the very purposes for which Section 38e was enacted. No competitor can know the price to sell at so as to compete with another product when the price of that product is posted at so much, "subject to patronage dividends or refunds." Indeed, such a posted price on its face shows that it is not the true selling price.

"'Therefore, in my opinion, any posted price which is not immediately mathematically certain does not comply with Section 38e and price lists containing any posted prices not so immediately mathematically certain should be rejected. Such would be price lists which list a price, subject to a patronage dividend or refund.'

"The cooperative contends that patronage dividends are not rebates within the meaning of the law; that it has the legal right as a corporation to distribute its profits to its stockholders; and that it was an abuse of discretion for the Board to suspend the license. In support of this contention the cooperative argues that, under state laws relative to corporations and their powers, it has the right to distribute its surplus-savings and earnings to shareholders, and that the Alcoholic Beverages Control Act may not infringe upon that right.

"It is to be observed that under our corporation laws the cooperative is empowered to declare patronage dividends; and that the ruling of the State Board of Equalization puts it out of business, at least insofar as the purchase of liquor for its members is concerned.

"This Court is unwilling to hold that the Alcoholic Beverages Control Act repeals that part of the Corporations Code applicable to payment of patronage dividends by cooperative corporations. This view of the law is supported by the policy of every state permitting the people to cut down the cost of insurance by membership in mutual insurance companies.

"A cooperative corporation is authorized by statute to distribute its earnings to shareholder-patrons, in amounts based upon the volume of business such patrons transact with the corporation. Corp. Code, 12805(c).

"A cooperative corporation is authorized by statute to engage in any lawful business. Corp. Code, 12201.

"Any person may lawfully engage in the wholesale liquor business if authorized to do so by a license issued pursuant to the provisions of the Alcoholic Beverage Control Act. Deering's Act 3796, Sec. 3.

"A person within the meaning of the Alcoholic Beverage Control Act includes any association, corporation, or any other group or combination acting as a unit. Deering's Act 3796, Soc. 2(f).

"It is the function of the courts to construe and apply the law as it is enacted, and not to add thereto, nor to detract therefrom. Pac. Coast, etc. Bank v. Roberts, 16 Cal. 2d 800, 108 P. 2d 439; Code of Civil Procedure, Sec. 1858.

"Appellant also urges that the judgment may not stand because two retail grocer members of the cooperative were made parties plaintiff. Members of a cooperative have identity of interest with the corporation not present in an ordinary corporation. Sec. 12201, Corp. Code. In any event, even if the retailers were not necessary parties, they were not improper parties. City of San Buenaventura v. McGuire, 8 Cal. App. 497, 97 P. 526, 528." (Underscoring added.)

A point that is not discussed in the opinion is that the cooperative was engaged in business and might or might not operate in the black. In other words, the members of this cooperative were not in advance assured that any patronage dividends or refunds would be paid to them. This depended upon whether the cooperative was successful in its operations and was able to make savings. (See "Consumers' Cooperatives and Price Fixing Laws," by Charles Bunn, Michigan Law Review 40, page 165; Legal Phases of Cooperative Associations, page 270.)

Attention is called to the fact that the Court laid some stress on the fact that the statute of California under which the cooperative was organized specifically provided for the payment of patronage dividends by cooperative corporations.

The Packers and Stockyards Act, 7 U.S.C. 181, the Grain Futures Act, 7 U.S.C. 1, and the Robinson-Patman Act, 15 U.S.C. 13, specifically recognize this right of cooperatives to pay patronage dividends or refunds.

OFFICE EMPLOYEES HELD NOT TO BE ENGAGED IN AGRICULTURAL LABOR

In the case of Squire v. Sumner Rhubarb Growers' Association, 184 F. 2d 94, the question of whether office employees of this association were employees upon whom the association was required to pay employment taxes was involved. A suit was brought by the association against the Collector of Internal Revenue for a refund of employment taxes which it had paid for the years 1943 through 1946, and it was agreed that such taxes were not required to be paid by the association except on the wages of its offce employees, so that the suit was confined to the question of whether the association was exempt from the payment of employment taxes on its office employees.

The Trial Court held that in view of the fact that the association was regarded as coming within the terms of paragraph 1 of Section 101 of 26 U.S.C., and also because the association qualified for exemption from the payment of Federal income taxes under paragraph 12 of Section 101 of 26 U.S.C., it was exempt from the payment of employment taxes on its office employees. The Collector of Internal Revenue then successfully appealed.

The Appellate Court said:

> "The facts are not in dispute and the problem on appeal concerns the proper application of the law to those facts. Appellee is a co-operative agricultural corporation organized under the laws of the State of Washington. Its members, numbering approximately 100, are rhubarb growers whese farms are located in the vicinity of Sumner, Washington. Appellee's principal business is selling the rhubarb grown by its farmer members. Most of the rhubarb is packed by these members in boxes which are sold to them at cost by appellee. Appellee then transports the rhubarb from the farms to its warehouse where the boxes are labeled according to grade and then stored until sold and shipped to the buyers. The proceeds from the sales are returned to the members except twenty cents per box which is retained to cover expenses of operation. Any amount remaining in this fund at the end of the season is returned to the members.
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> "Appellee is only active during the four month rhubarb growing season. It employs a maximum of approximately twelve people. Most of them are engaged in the actual packing, labeling, transporting, storing and shipping of the rhubarb. Three or four of the employees are engaged primarily in office work. The question before us concerns the applicability of the Federal Insurance Contributions Act 26 U.S.C.A. §§ 1400-1432 to these office employees.
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> "Section 1426 defines 'employment' under the Act as meaning ' * * * any service, of whatever nature, performed * * * by an employee for the person employing him * * *,' with several enumerated exceptions. Three of these exceptions are pertinent to consideration of the problem before us.
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> "Section 1426(b) (10) (B) excepts from the defination of 'employment' service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1). If, as the trial judge concluded, appellee is an agricultural or horticultural organization within the meaning of section 101 (1) of the Internal Revenue Code it follows that none of the service performed by any of its employees constitutes 'employment' under the Social Security Act. However, we think, that the trial court clearly erred in reaching this conclusion.

Treasury Regulations 111, § 29.101 (1)-1 limit the scope of section 101 (1) of the Code to agricultural or horticultural organizations which: '(1) Have no net income inuring to the benefit of any member; (2) Are educational or instructive in character; and (3) Have as their objective the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.' The trial court did not hold that these regulations are arbitrary or invalid and appellee does not so argue. Instead, appellee contends that it comes within the regulatory requirements. We think that a realistic view of the situation discloses that in fact all of the income from appellee's business transactions inures to the benefit of its members. Furthermore, the evidence does not show and appellee does not contend that it is an organization which is in any degree educational or instructive in character."

Paragraph 1 of Section 101 of 26 U.S.C. provides that "agricultural or horticultural organizations" are exempt from taxation under the Chapter in question. As pointed out above, the Court was of the opinion that the association was not an agricultural or horticultural organization as that term was used in the statute, and as it had been defined in the regulations of the Bureau of Internal Revenue.

Section 1426(b) (10) (A) exempts from employment taxes services performed in the employ of an organization exempt from the payment of income taxes under paragraph 12 of section 101 if "(i) the remuneration for such service does not exceed $45 [per quarter], or (ii) such service is in connection with the collection of dues * * *, or (iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university." The association contended that it was exempt from the payment of employment taxes on its office employees by reason of the statutory provision quoted above, but the Court in referring to that provision said that it only "provides a limited exception for services performed for organizations exempt from the payment of income tax under section 101 of the Code. The trial court concluded that appellee was exempt from the payment of income tax under section 101(12). It was undoubtedly correct in so holding. However, that does not dispose of the matter. For unlike subsection (b) (10) (B) of section 1426, subsection (b) (10) (A) does not provide a blanket exception. To the contrary, only limited exceptions are accorded and appellee does not contend, nor would the record permit such contention, that the services of any of its employees here in dispute fit within the statutory limitations. Consequently, even though appellee is exempt from payment of income taxes it does not follow, under the facts shown here, that it is exempt from social security taxes upon the wages of its employees."

The association further contended that the labor of the office employees in question came within the definition of agricultural labor as given in the Social Security Act, and since no employment taxes were required to

be paid on account of agricultural labor, the association argued that it was relieved from the payment of such taxes. In this connection the Court said:

"Appellee points to another section of the Code to sustain the judgment of the court below. Section 1426(b) (1) excepts from the term 'employment,' 'Agricultural labor, as defined in subsection (h) of this section.' Turning to subsection (h) we find a rather comprehensive and specific definition of the term 'agricultural labor.' Both parties agree that if the services here involved constitute agricultural labor they would do so only under the provisions of subdivision (4) of subsection (h). Appellant's position is that these provisions require the employees to actually do the physical work of handling, packing, storing, delivering, etc., the rhubarb, if their services are to constitute agricultural labor. The Treasury Regulations so provide.

"Appellee contends that since the services in dispute are a necessary incident to the marketing, storing, transporting and sale of the rhubarb they therefore constitute 'agricultural labor' within the statutory defination of the term; that the portion of the regulation to the contrary * * * should be declared invalid because it is arbitrary, unreasonable and in conflict with the statute and with other portions of the regulations. This contention must be considered in light of the Supreme Court's declaration that courts should not ordinarily interfere with the regulations.

"Appellee points out that subdivisions (1), (2) and (3) of subsection (h) include the phrase 'in connection with' in defining services which constitute the excepted 'agricultural labor,' and contends that even though this phrase is not included in subdivision (4) it should be read in by implication. We do not think that such a construction is warranted here. The Secretary, in promulgating the Treasury regulations, apparently felt that the omission of the broadening words 'in connection with' from subdivision (4) justified a stricter construction of that subdivision than that accorded the preceding subdivision, all of which carried the term 'in connection with.' We see no weighty reason to overrule this construction. It is perhaps a narrower interpretation than we would have given the statute in the first instance, but since it does not depart from or conflict with the exact language of the statute, we cannot say that it is inconsistent therewith, or otherwise arbitrary or unreasonable.

"The trial court refused to declare this portion of the regulations to be invalid, but held that it did not apply to the facts of this case. We think that it clearly does; and therefore must control.

"Appellee argues that the words 'incident to' in subdivision (4) * * * require the same broad construction as the words 'in connection with' of the preceding three subdivisions. We do not agree. Clearly the qualification that the services be incident to the preparation of fruits or vegetables for market was included as an additional requirement over and above the requirement that the services be performed in handling, etc., the commodities.

"Birmingham v. Rucker's Breeding Farm, 8 Cir., 152 F. 2d 837, which appellee contends supports the judgment below, is readily distinguishable. In that case the court held that the services performed by the appellee's employees (including office employees) constituted agricultural labor. However, the court was there concerned with the application of subdivision (3) of section 1426(h). It pointed out that the words 'services performed * * * in connection with the hatching of poultry' were clearly used by Congress advisedly and required the broad construction given to that portion of the statute by the district court. Applying the same reasoning we think that the omission of these words (italicized above) from the section of the Code which is involved in this case clearly justifies the construction given by the Treasury Department in its regulations." (Underscoring added.)

Particular attention is called to the fact that the Court distinguished the instant case from the case of Birmingham v. Rucker's Breeding Farm, 8 Cir., 152 F. 2d 837, because the employees in that case were found to be employees "in connection with the hatching of poultry," while in the instant case the words "in connection with" were omitted from the clause in the section of the statute upon which the association relied.

APPLICATION OF KEOKUK, IOWA, MILK ORDINANCE

In the case of Minor v. City of Keokuk, Iowa, et al., 92 F. Supp. 833, it appeared that the City of Keokuk, Iowa, had an ordinance which is quoted in part below:

"Sec. 391. Points Beyond the Limits. Milk and milk products from points beyond the limits of routine inspection of this City may not be sold in the City of Keokuk, or its police jurisdiction, unless produced or pasteurized under provisions equivalent to the requirements of this Chapter." (Underscoring added.)

The City of Keokuk refused to permit the sale of milk in that city furnish by a concern located in Peoria, Illinois, although it was claimed that this milk was produced or pasteurized under conditions equivalent to the requirements of the milk ordinance of Keokuk. Because of the refusal of the City of Keokuk, Iowa, to permit the sale of the milk in question in

Keokuk, a suit for an injunction was brought against the city. The following quotations from the opinion show the basis on which the injunction was granted:

"The bill of complaint and the proof adduced at the preliminary hearing disclosed that plaintiff was operating as a milk distributor of the products of J. D. Rozell Company of Peoria, Illinois, a subsidiary of the National Dairy Products Corporation. By recognized standards and tests promulgated by the United States Public Health Service supervision of the pasteurization and distribution of milk in Peoria, Illinois, is under conditions, regulations and provisions equivalent in the strictest sense to those requirements of the Keokuk Milk Ordinance. To say otherwise is frivolous argument. Equivalence having been established in this respect the bases of defendants' grounds for denying plaintiff a permit to sell his milk in Keokuk become insubstantial, unless as defendants assert: '* * * it is obvious that no milk offered for sale in the City of Keokuk is equivalent unless it has been subjected to herd and dairy inspection by the local inspector.'

"On this defense, the court cannot give approval to the exercise of a police power which operates absolutely to exclude plaintiff's product, a legitimate article of trade, from interstate commerce. The impact upon this plaintiff in the denial of his constitutional rights in this respect is as great in the eyes of the court as if an interstate railroad were involved.

"As was most ably said by Judge Chestnut in Miller v. Williams, D.C., 12 F. Supp. 236, regulatory restrictions may be imposed by the milk commissioner of Keokuk, but such restrictions must be reasonable and, in their enforcement, must have for their proper purpose, safeguards as to quality of the product within the province of the defendants' governmental as distinguished from their proprietorial function.

"The limitations upon the equity jurisdiction of the federal courts are not so totally circumscribed by policy as to compel a closed door attitude in every instance where a state or municipality is involved. This policy of abstention on the part of the federal courts to refrain from granting injunctions in such special instances is most strongly worded in Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 500, 61 S. Ct. 643, 85 L. Ed. 971. I do not think however that the reach of this policy is entirely applicable here, but rather the expressions of the Supreme Court in such cases as Reagan v. Farmers' Loan & Trust Company, 154 U.S. 362, at page 390, 14 S. Ct. 1047, at page 1051, 38 L. Ed. 1014, where the court said: 'Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered

by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual.'" (Underscoring added.)

The Court further said:

"To make the attitude of the court clear on this ruling, let it be emphasized here that, while the plaintiff is entitled to the injunction, he must otherwise comply with all reasonable requirements and provisions of the Keokuk Milk Ordinance in question." (Underscoring added.)

It is believed that the basis for the opinion of the Court is that the milk in question was the equivalent of the milk produced on farms inspected by inspectors of the City of Keokuk. In other words, the Court apparently proceeded on the theory that the officials of the city had not correctly applied the milk ordinance of the city.

In the case of Moultrie Milk Shed, Inc., v. City of Cairo, et al., decided by the Supreme Court of Georgia, 57 S.E. 2d 199, Summary No. 45, page 25, an ordinance of the City of Cairo which prohibited the sale of milk within the city limits of Cairo unless it had been pasteurized at a plant located in Grady County, the County in which the City of Cairo is located, was held unconstitutional.

MEMBERS OF NONSTOCK ASSOCIATION NOT STOCKHOLDERS THEREOF

In the case of Warren Rural Electric Cooperative Corporation, Inc. et al. v. Harrison et al., 312 Ky. 702, 229 S.W. 2d 473, it appeared that a proceeding was instituted for the purpose of obtaining a declaratory judgment with respect to the question of whether the board of directors of the electric cooperative had been duly authorized by its members to borrow up to $10,000,000 under the Rural Electrification Act and to give security therefor.

A meeting of the electric cooperative was held on August 30, 1940. Notice of the meeting was properly given, and it recited among other things that action would be taken on authorizing the board of directors to borrow up to $10,000,000 and to authorize the board of directors to execute on behalf of the cooperative notes, bonds, or other evidences of indebtedness covering the amounts borrowed, and to mortgage or pledge all the property of the cooperative as security for such loans. At the time of the holding of the meeting the cooperative had more than 6,000 members. There were 643 members present in person while more than 2,500 proxies were presented, passed upon, and counted by the Chairman of the meeting.

A quorum was present at the meeting, as the bylaws of the cooperative provided that if the total number of members did not exceed 500, 50 members, or 5 percent of the total membership present in person, whichever was the larger, would constitute a quorum. A resolution to confer the

necessary authority on the board of directors to borrow the money in question and to give security therefor was duly moved, seconded, and voted upon. The Acting Chairman "declared the resolution had failed of passage relying upon Section 279.130, Kentucky Revised Statutes, which provides: ' * * * The obligations (of the Cooperative) shall be authorized by resolution of the board of directors, after a resolution is first passed by a majority of the common stockholders giving the board that power.'" In view of the ruling of the Acting Chairman, the proceeding for obtaining a declaratory judgment was instituted to determine its correctness.

The suit was instituted by a member of the cooperative and by a person who had filed an application for membership, but which the board of directors of the cooperative had not granted because the cooperative on account of a lack of funds was unable to extend its lines to his rural home. It was allegod that this person represented a large number of other persons "too numerous to be brought before the Court, but all interested in the question before us which is one of common and general interest to all of them." The cooperative was "made a defendant with all of its Board of Directors and in addition two other members are made defendants representing those who are opposed to the resolution." In this way it appeared that all parties who had any direct interest in the matter were represented in a representative capacity and were thus before the Court.

The Chancellor who tried the case in the first instance found in favor of the cooperative and held that the board of directors had been duly authorized to borrow the money and to secure the same. The case was then carried to the Court of Appeals of Kentucky, which Court adopted the opinion of the Chancellor who tried the case as its own opinion. Referring to section 279.130 of the Kentucky Revised Statutes, which states that "The obligations (of the Cooperative) shall be authorized by the resolution of the board of directors, after a resolution is first passed by a majority of the common stockholders giving the board the power," the Court said:

> "It is the opinion of this Court that this section has no application to the present Cooperative, which is without capital stock and has no stockholders either common or preferred. The Rural Electric Cooperative Act of the Legislature of Kentucky of 1937 may be found as Chapter 279 of the Kentucky Revised Statutes, and is somewhat confusing in that it embraces and authorizes the formation of both stock and nonstock corporations or of both profit and nonprofit corporations. Stock corporations formed for profit are not strictly electric cooperatives where the members furnish no capital and are not producers but consumers and enjoy no profit. The Kentudky Act of 1937 refers to both and care must be taken to distinguish between them in interpreting the various provisions of the Act. However, the Chairman may have been moved by a consideration of applying the democratic principle of majority rule, and therefore required a majority of the

total membership in order to pass the resolution. Here, however, the membership is so extensive as is evidenced as in the present instance, the requirement of the majority of the total membership is inapplicable and would prevent the carrying out of the salutary and beneficial purposes of the Cooperative. Besides, as I shall show, the applicable provisions of the Kentucky Act of 1937 only require the majority of all members present and voting at any meeting properly called, in person or by proxy. Nor does this involve any sacrifice of any democratic principle. With the latter test applied, the resolution overwhelmingly carried at the meeting referred to." (Underscoring added.)

* * * * * * * *

"By Section 279.140, KRS, it is provided that: '* * * no corporation formed under this chapter may sell, mortgage, lease or otherwise dispose of any of its property unless the board of directors is authorized so to do by a majority vote of the members present and voting at the meeting at which the proposed sale, mortgage, lease or other disposition is voted upon.'

"Moreover, there is provided by Section 279.170, Kentucky Revised Statutes, that one or more Cooperatives may consolidate, 'If the agreement is approved by a majority vote of the members of each corporation present and voting at the meeting at which the proposed consolidation is voted upon, * * *.'

"By Section 279.180, Kentucky Revised Statutes, it is provided that corporations formed under the chapters referred to may dissolve, provided it is certified by the president and secretary that they have been authorized to execute and sign the articles of dissolution, 'by a majority vote of the members present and voting at the meeting at which the proposed dissolution is voted upon.'

"Now there are two apparent exceptions to the rule of resolutions being carried by a majority of the members present and voting at any properly called meeting, and one is found in Section 279.050, Kentucky Revised Statutes, where the Articles of Incorporation having been adopted, properly filed and in force may be amended. 'The amendment shall first be approved by twe-thirds of the directors and then adopted by a vote representing a majority of all the members of the corporation.' And by Section 279.060, Kentucky Revised Statutes, where other corporations and reorganizations would be brought under the Electric Cooperative Act of 1937, it is provided that a written declaration shall be filed with the Secretary of State signed and sworn to by its President

and Secretary to the effect, 'that the company or association has, by a majority of its stockholders, decided to accept the benefits and be bound by the provisions of this chapter.'

"Thus, wherever a majority of the entire membership or of all of the stockholders is required, this Statute plainly says so and such instances must be distinquished from those applicable sections which may be applied to the case before us, where motions or resolutions may be passed by a majority of those members present and voting at the meeting either in person or by proxy. Indeed when you consider that the very heart of an Electric Cooperative and its very life depend upon its ability to borrow money from the Federal Government under the Rural Electrification Act of 1936, as amended, which may be found in Volume 7, U.S.C.A., Chapter 31, Section 901 et seq., the purposes of such a Cooperative which are without a doubt beneficial to all those engaged in farming and in rural areas, would be nullified since it is almost impossible in a Cooperative so extensive and with a membership so numerous as the one before us, to obtain at a meeting, however carefully prepared, when a majority of the total membership vote in favor of any particular measure. No more salutary or beneficial device has been inaugurated in Kentucky or in the nation than that of Rural Electric Cooperatives. The use of electric energy upon isolated and distant farm areas has and will relieve the drudgery and hardships upon the farmers of the State and lighten the burdens of toil, particularly devolving upon the women of the household. Electric energy may be now used in so many ways that are useful in the home, thereby making home life more profitable, useful and comfortable, and by Section 279.020, Kentucky Revised Statutes, the general policy is declared of encouraging the fullest possible use of electric energy in the State of Kentucky by making it available by transmission and distribution to persons in rural areas of the State at the lowest cost consistent with sound business method and prudent management. The capital for such a Cooperative cannot otherwise be provided than the way it is now being provided under a Federal Act whereby money is provided from the U. S. Treasury upon a long term not to exceed 35 years and a low rate of interest."

The Court further found that under the articles of incorporation and bylaws of the cooperative the members had properly authorized the board of directors of this nonstock cooperative to borrow the money and to give security therefor.

Generally speaking, it is submitted that the term "stockholder" does not include members of nonstock associations. In the absence of statutory provisions defining the term "stockholder" to include members of nonstock associations, this term is not applicable to members of a nonstock association. On the other hand, stockholders are commonly and generally referred to as members, but members of nonstock associations are not commonly and generally referred to as stockholders.

EX-MEMBERS ENTITLED TO NOTHING

From the opinion in the case of Schroeder, et al., v. Meridian Improvement Club, decided by the Supreme Court of Washington, 221 P. 2d 544, it appeared that the Meridian Improvement Club was incorporated in 1943 for the purpose, among others, of promoting "the general welfare of Seattle's Meridian district by bringing its residents into closer association with one another and providing a community club in which they may unite in studying and dealing with problems of civic and community interest." The Club acquired a piece of property in 1943. By April 1, 1947, interest in the Club had declined until "there were only thirteen paid-up members." Soon thereafter the property of the Club was sold for $4,000, and after paying off certain persons who had furnished money for the purchase of the Club, and "after all costs and expenses had been paid, the sum of $274.80 was distributed to each of the paid-up members."

In other words, the amount of money that was left after meeting all obligations of the Club was distributed among the persons who were members of the Club at the time. A suit was then brought by persons who formerly had been members of the Club, and by certain persons who had been denied membership in the Club shortly before the sale of the property. The Trial Court set aside the deed of transfer to the property in question, and an appeal was then taken by the Club to the Supreme Court of Washington. In reversing the Trial Court, the Appellate Court said:

> "The amended complaint lists three groups of plaintiffs who, it is contended, were entitled to prosecute this action: (1) certain named individuals who were, it is alleged, paid-up members of the corporation at the time of the commencement of the action; (2) certain named individuals who claimed a right in the property of the corporation because each had contributed $100 as a part of the trust agreement of October 17, 1943; and (3) those plaintiffs who had never been members but who claimed the right to membership by offering to pay dues, because they were property owners or residents of the Meridian district.
>
> "Considering these allegations inversely: (3) None of this group had ever been members of the corporation. It is

true that Article V of the constitution provided that 'any property owner or resident within the confines of the district shall be eligible for membership.' 'Eligible' means suitable, qualified, fit, worthy, capable of being chosen. See State ex rel. Reynolds v. Howell, 70 Wash. 467, 126 P. 954, 41 L.R.A.,N.S., 1119. But merely being eligible for membership does not entitle them to maintain this action. They were not and never had been members.

"'Membership in a voluntary association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The courts cannot compel the admission of an individual into such an association, and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion. * * *' 4 Am. Jr. 462, Associations and Clubs, § 11.

"The trust agreement of October 17, 1943, was between eleven members, designating themselves as 'beneficiaries'. They each put up $100 and bought the real estate contract from Mr. Holbach. They designated three of their number as trustees who would hold the legal title to the property in trust for the beneficiaries.

* * * * * * * *

"The beneficiaries received their contributions back with interest. They had no further interest in the property of the corporation. Their only interest was as beneficiaries by virtue of the trust agreement.

"None of the named plaintiffs had paid their 1947 dues at the time the action was commenced.

* * * * * * * *

"By-laws may be self-executing, or may require affirmative action on the part of the corporation or its officers to inflict a penalty or effect a forfeiture provided for by by-law. Boisot on By-Laws, 2d Ed., 174 § 150. There is a distinction between a loss of membership for failure to pay dues, and an expulsion for crime or misconduct inimical to the organization's being. In the latter instance the member must be given a hearing after notice, before he can be expelled. However, the by-laws may provide for a loss of membership ipso facto for failure to pay dues and, when that is the case, notice is not necessary unless specially provided for. See 12 Fletcher, Cyclopedia Corporations, Perm. Ed., 992, § 5695, and cases cited therein.

"'The fact that a club or society is incorporated does not in any way affect its right to make its own rules and by-laws, unless there is something in its charter or in the general law under which it is incorporated which controls it in this respect, since the exercise of this power is the right of every corporation. An incorporated social club may regulate, through its by-laws, the causes for the expulsion or suspension of members and the manner of effecting the same, when such power is expressly conferred by its charter. It is also a rule of general application that one who has become a member of an incorporated social club will be deemed to have known and assented to the provisions of its charter and by-laws, which it was authorized to make, and cannot object to the enforcement thereof on the ground that he is deprived of any legal or constitutional right. However, the by-laws must be limited to the powers enumerated in the corporate charter, plus those necessarily implied from the object of incorporation.' 4 Am. Jur. 460, Associations and Clubs, § 8.

"Turning now to the by-laws, we find that any member who fails to pay his dues for the current year by April 1st will be considered in bad standing and his membership shall cease. Respondents are conclusively presumed to have known these provisions. They were self-executing; no notice was necessary. Upon the failure of any member to pay his 1947 dues by April 1, 1947, his membership ceased ipso facto and with the loss of membership went any interest in the property of the corporation. At the time it was decided to disincorporate and sell the property, none of the respondents had membership in the corporation. They therefore had no interest which could have been affected by the action of the members and are not entitled to maintain this action." (Underscoring added.)

For further discussions of the general subject under consideration, see "Financial Interest of Withdrawing Members in an Association," Summary No. 16, page 1; also, "Loss of Financial Interest of Members in Association," Summary No. 20, page 9.

MILK ORDERS - COOPERATIVE PAYMENTS

In the case of Stark v. Brannan, 82 F. Supp. 614, it appeared that certain milk producers, not members of the cooperative involved, brought suit against the Secretary of Agriculture of the United States for an injunction to restrain him from enforcing certain provisions of a milk order regulating the handling of milk in the Greater Boston, Massachusetts, area and for a judgment declaring the provisions

in question, which provided for the making of payments to a cooperative association for services performed by it for the general good of the market, unauthorized, illegal, and void. The Court held that the provisions in the milk order providing for the making of such cooperative payments were not authorized by the terms of the Agricultural Adjustment Act, 7 U.S.C.A., Section 601, et seq., and hence judgment was rendered in favor of the plaintiffs. The case was then carried to the United States Court of Appeals for the District of Columbia, and decided on November 9, 1950, which Court affirmed the judgment of the Trial Court by a two to one decision. There was a vigorous dissenting opinion.

It is understood that an appeal will probably be taken to the Supreme Court of the United States.